
COMMENT

BASED UPON: DERIVING PLAIN MEANING FROM THE FALSE CLAIMS ACT'S JURISDICTIONAL BAR

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INTRODUCTION

The “public disclosure” jurisdictional bar (PDJB) to the False Claims Act (FCA)¹ limits federal jurisdiction over qui tam actions. The PDJB states in part that “[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions.”² The purpose of this section is to prevent

¹ 31 U.S.C. §§ 3729–3733 (2006). The “public disclosure” jurisdictional bar itself is at § 3730(e)(4). The FCA creates a qui tam action, allowing relators, often called whistleblowers, to bring suit on behalf of the government against corporations engaged in fraudulent behavior. *Id.* § 3730(b). The term “qui tam” is a shortening of the Latin phrase “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*”—“who as well for the king as for himself sues in this matter.” BLACK’S LAW DICTIONARY 1282 (8th ed. 2004).

In addition to creating a right of action, the FCA further encourages whistleblowing through a financial incentive and provides protection against employer retaliation. *See* 31 U.S.C. § 3730(d)(1) (“If the Government proceeds with an action brought by a [relator], such person shall . . . receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim.”); *id.* § 3730(h) (“Any employee who is discharged, . . . or in any other manner discriminated against . . . by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section . . . shall be entitled to all relief necessary to make the employee whole.”).

² 31 U.S.C. § 3730(e)(4)(A). The full text of the bar reads,

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Id. (footnote omitted). Throughout this Comment, and without loss of accuracy, this provision is shortened to exclude the last portion, reading “in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.” While this shortening removes an instance of syntactic ambiguity (in the attachment height of the “in” clause, *see infra* note 63 and accompanying text (describing attachment-height ambiguity)), it is not an important ambiguity to this analysis, and the sentence lacks any real semantic meaning if this phrase modifies anything other than “public disclosure.” Further, the last part of the phrase—“unless the action is brought by the Attorney General or the person bringing the action is an original source of the information”—is a subordinate clause, introduced by the subordinating conjunction “unless,” and can be safely ignored for purposes of this

“parasitic” lawsuits³—suits brought by individuals who have no real connection to the underlying dispute between the government and a private contractor that are filed in hopes of reaping a large reward under the damage-sharing provision of the FCA.⁴ However, in giving effect to the PDJB, the courts of appeals have split over precisely when an action should be considered “based upon” a public disclosure.

There are two competing interpretations of the PDJB: The majority of circuits interpret the provision to bar any action supported by the same information that has been publicly disclosed.⁵ The minority view gives weight to the source of the information—it requires that the action “both depend[] essentially upon publicly disclosed information and [be] actually derived from such information.”⁶ Through careful and rigorous analysis of both the statutory language and the purpose that it serves, this Comment argues that the minority rule is both the only natural reading of the statute and the most effective implementation of congressional intent.

This Comment first defines the problem clearly. Part II then considers the statutory text within a rigorous analytic framework adopted from the field of linguistics. As linguistic analysis may be unfamiliar to many readers, this Part is accompanied by a discussion of the value of linguistics to statutory interpretation and a description of the analytical model. Following the textual analysis, the Comment, in Part III, examines other, nontextual considerations in interpreting the PDJB.

analysis. See generally ANDREW RADFORD, TRANSFORMATIONAL GRAMMAR 133-37 (1988) (discussing subordinating conjunctions and their syntactic role in sentences).

³ *United States ex rel. Fowler v. Caremark Rx, L.L.C.*, 496 F.3d 730, 735 (7th Cir. 2007) (quoting *United States ex rel. Gear v. Emergency Med. Assoc. of Ill., Inc.*, 436 F.3d 726, 728 (7th Cir. 2006)), *cert. denied*, 128 S. Ct. 1246 (2008).

⁴ A qui tam plaintiff is entitled to fifteen to twenty-five percent of any proceeds resulting from the action or settlement of the claim. 31 U.S.C. § 3730(d)(1).

⁵ The opinions adopting the majority rule in each jurisdiction are *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 334 (3d Cir. 2005); *Minnesota Ass’n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1045-47 (8th Cir. 2002); *United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*, 123 F.3d 935, 940 (6th Cir. 1997); *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 451 (5th Cir. 1995); *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 567 (11th Cir. 1994); *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645, 653-55 (D.C. Cir. 1994); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir. 1993); *Chen-Cheng Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992); *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 552-53 (10th Cir. 1992).

⁶ *Fowler*, 496 F.3d at 737 (quoting *United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 497 (7th Cir. 2003)); see also *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347-50 (4th Cir. 1994) (adopting the minority view of the PDJB).

The analysis concludes that the minority rule represents both the best statutory interpretation and the most sound policy implementation.

I. DEFINING THE PROBLEM

This Comment considers actions brought under the FCA by individuals who have direct, independent knowledge of transactions that have been publicly released by another source. The structure of the PDJB is twofold: first, it establishes those actions over which federal jurisdiction is denied,⁷ and second, it creates exceptions to this denial for actions brought by the Attorney General or an “original source” of the publicly released information underlying the action.⁸ At first blush, the “original source” exception appears to cover the case of an individual who sues on information obtained independently of a public release.⁹ Indeed, the language defining an “original source” provides further support for this reading: “[O]riginal source’ means an individual who has direct and independent knowledge of the information on which the allegations are based”¹⁰

Despite the above discussion, there are several reasons to prefer treating this Comment’s hypothetical whistleblowers as entirely outside the reach of the PDJB, rather than as original source exceptions:

1. The statutory language states that the PDJB does not reach these actions. While in many instances the phrasing of the jurisdictional bar is quite unclear and ambiguous,¹¹ on this par-

⁷ 31 U.S.C. § 3730(e)(4)(A).

⁸ *Id.* § 3730(e)(4)(A)–(B).

⁹ *But see* Aaron P. Silberman & David F. Innis, *The Supreme Court Raids the Public Disclosure Bar: Cleaning Up After Rockwell International v. United States*, PROCUREMENT LAW. (Section of Public Contract Law, ABA, Chicago, Ill.), Summer 2007, at 1, 20 (noting that “whether a relator must have been the catalyst for a public disclosure in order to qualify as an original source” is a critical issue left unanswered by the Supreme Court in *Rockwell Int’l Corp. v. United States*, 127 S. Ct. 1397 (2007)).

¹⁰ 31 U.S.C. § 3730(e)(4)(B).

¹¹ The Supreme Court, in a single opinion regarding the PDJB, has wrestled with two separate and unrelated linguistic ambiguities. First, the court decided that the “allegation[s]” of § 3730(e)(4)(B) are separate from the “allegations or transactions” of § 3730(e)(4)(A). *Rockwell Int’l Corp.*, 127 S. Ct. at 1407-08. Second, the Court ruled that “‘information’ in [§ 3730(e)(4)(A)] and [§ 3730(e)(4)(B)] means the same thing.” *Id.* at 1408. Continuing on, however, the Court found the notion that “‘information’ in [§ 3730(e)(4)(A)] refers to the information underlying the publicly disclosed allegations or transactions” to be “highly questionable.” *Id.* This interpretation of the statute seems tortured—particularly for such an ordinary-meaning proponent as Justice Scalia, who authored the opinion—though perhaps not more tortured than the language of § 3730(e)(4) itself.

ticular point it is clear. And although the definition of an “original source” may include all individuals with independent knowledge of facts supporting the action, the analysis need not reach that question if the action is not barred by the PDJB in the first place.

2. The statutory purpose of encouraging whistleblowers to come forward is served only when those whistleblowers are actually able to recover. By subjecting these actions to “original source” jurisprudence, the likelihood of recovery—and therefore of whistleblowing—is decreased because whistleblowers must meet a heightened requirement at all stages of litigation.¹²

3. Exempting these actions from the PDJB reduces a contractor’s incentive to strategically disclose damaging information in a convoluted form, in order to prevent potentially whistleblowing employees from filing suit.¹³

This Comment therefore proceeds under the assumption that the “original source” exception is not the appropriate solution to the problem and argues that the PDJB simply does not apply to cases where the plaintiff has obtained information independently of the public disclosure.¹⁴

¹² As a jurisdictional provision, the PDJB can be invoked at any time during litigation. For example, if a litigant begins a qui tam action based solely on her personal and independent knowledge, but determines through discovery—or later—that the case turns on information in the public domain and of which she is not an original source, her stake in the case is lost. *See id.* at 1408-09.

¹³ Courts have read the PDJB to bar actions based upon publicly released information even where that information is “not readily comprehensible to nonexperts.” *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 655 (D.C. Cir. 1994). Thus, a contractor could, in theory, strategically design a public release of records to include inculpatory material, but in such a form that it does not immediately appear suspect. The release, if successful, would remove the possibility of an employee’s profiting from a qui tam action, but it would not subject the contractor to any real risk of exposure.

¹⁴ Some courts have noted a concern that this interpretation eviscerates the utility of the “original source” exception. *See, e.g., United States ex rel. Minn. Ass’n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1045 (8th Cir. 2002) (“The majority of courts have considered it inconceivable that Congress would have drafted the statute so poorly as to have included a provision that could never have any effect.”). For a discussion of why this concern is unfounded, see *infra* note 113 and accompanying text.

II. THE PLAIN LANGUAGE OF THE STATUTE

It is perhaps tautological to state that, when one considers the legislative acts of Congress, “the plain language of the enacted text is the best indicator of intent.”¹⁵ Indeed, whenever an individual speaks, the listener’s natural response is to determine the meaning of the speech and attribute that meaning to the speaker as her “intent.” Without such a system of assigning meaning and intent, communication would be impossible, regardless of whether the speech at issue is spoken in conversation or written in the United States Code. Speech in any form is, however, rarely precise enough to yield only one interpretation, which can make intent quite difficult to find. On this point, the field of linguistics can provide very useful tools to determine when language is—or is not—ambiguous. Employing these tools, one can see that, despite the disagreement over its proper interpretation, the linguistic interpretation of the PDJB is unambiguously clear.

This Part considers the so-called plain meaning of the PDJB in a novel, systematic way. Rather than comparing dictionary definitions, this approach relies on a model for the technical linguistic analysis of statutory language.¹⁶ The first section provides a background argument for why linguistic analysis bears on plain-language statutory interpretation. The second section lays the foundation for the model, which is built on relatively simplified linguistic principles. The final section applies the model to the PDJB’s statutory text, demonstrating that the minority rule truly “holds the trump card, the plain-language interpretation.”¹⁷

A. *Why Linguistic Analysis of the PDJB*

Given the current proclivity of the Court towards “plain meaning” interpretation of statutory law,¹⁸ and the disarming proposition that plain meaning is derived from “common sense,”¹⁹ it is perhaps unsur-

¹⁵ *Nixon v. United States*, 506 U.S. 224, 232 (1993).

¹⁶ For a particularly troubling example of dictionary comparisons, see *infra* note 54.

¹⁷ *United States ex rel. Fowler v. Caremark Rx, L.L.C.*, 496 F.3d 730, 738 (7th Cir. 2007), *cert. denied* 128 S. Ct. 1246 (2008).

¹⁸ See Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1440-41 (1994) [hereinafter *Looking It Up*] (identifying the plain-meaning rule as one of the “most significant manifestations” of the Supreme Court’s increased focus on textualism in statutory interpretation).

¹⁹ See, e.g., *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1823) (“[W]here the words of a law . . . have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is . . . a dictate of common sense . . .”).

prising that opinions relying heavily on plain meaning are also heavy on intuition and *Webster's Third*,²⁰ but light on analytical rigor.²¹ A more rigorous analysis is, however, possible. Human linguistic intuition is not only susceptible to technical study, but it is actually understood quite well.²² Further, the emphasis on “plain meaning” in the context of statutes is misplaced. Human language is a complex system capable of infinite meaning²³ and riddled with ambiguity—yet, despite this complexity, the speaker’s intended meaning is usually discerned by her audience.²⁴ As the context shifts from that of a single speaker orating to an audience toward the speech-by-committee model of the legislature—where words are written rather than spoken—the ability of the audience to discern intent is notably diminished.²⁵ Thus, the

²⁰ See *Looking It Up*, *supra* note 18, at 1438-40 (discussing the Supreme Court’s increased reliance on dictionary definitions in the 1980s and early 1990s).

²¹ A November 2008 search of federal case law on Westlaw for [“syntactic theory”] returns no results, while [“semantic theory”] returns a single result, which discusses the difference between pragmatics and semantics in a footnote. See *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 689 n.13 (3d Cir. 1982). A more general search for [linguistics /p (“plain meaning” or “ordinary meaning” or “plain language”)] returns only three results, of which none actually implements linguistic analysis, and one flatly states that “[p]roper construction does not require resort to all possible refinements of technical legal linguistics.” *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948). Expanding the query to [linguistic! /p (“plain meaning” or “ordinary meaning” or “plain language”)]—and thereby including many results that use “linguistic” colloquially, rather than to refer to the formal study of linguistics—increases the number of results to 190, but it does not reveal any fuller treatment of the subject. A typical example states that “it is not the responsibility or function of this court to perform linguistic gymnastics.” *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 791 n.4 (1981) (Stevens, J., concurring in judgment) (quoting *Alabama v. Marshall*, 626 F.2d 366, 369 (5th Cir. 1980)). The brackets around the search-string examples above indicate the start and end of search queries, as the quotation marks are part of the queries.

²² For a discussion of just how complex, and how well understood, the problem of language intuition is, see RAY JACKENDOFF, *PATTERNS IN THE MIND: LANGUAGE AND HUMAN NATURE* 3-7 (1994).

²³ See, e.g., NOAM CHOMSKY, *LANGUAGE AND MIND* 71 (enlarged ed. 1972) (“It seems clear that we must regard linguistic competence—knowledge of a language—as an abstract system underlying behavior, a system constituted by rules that interact to determine the form and intrinsic meaning of a potentially infinite number of sentences.”).

²⁴ One interesting exception to this rule is poetry, in which the point is often to exploit the ambiguity of language. See generally SOON PENG SU, *LEXICAL AMBIGUITY IN POETRY* (1994). However, poetic ambiguity is not typically found in legislation—but see *Rapanos v. United States*, 547 U.S. 715, 732 n.4 (2006) (plurality opinion), in which Justice Scalia chides Justice Kennedy for reading the Clean Water Act as endorsing a “poetic usage of ‘waters.’” See also *infra* note 54.

²⁵ Indeed, at least one linguist has argued that the work done by pragmatics—the use of nonword cues, such as tone or physical motion, to convey meaning—must be

courts' ability to intuit "plain meaning" from legislation is strained. And if achieving the "correct" reading of complicated language is a goal of the legal system, the judiciary ought to consider the technical nature of that work and adopt the appropriate tools. This consideration is no more than is asked of courts in other areas. For example, any court could reasonably intuit how much compensation would be appropriate for lost future wages, yet the public—practitioners, juries, and observers—insists upon actuarial calculus in reaching enforceable judgments.²⁶

The PDJB has been subject to much intuitive linguistic scrutiny by the federal courts. The meanings of many words and phrases—notably "information," "allegations," and "transactions"—have been questioned and challenged in the Supreme Court,²⁷ and at least one court of appeals has considered the meanings of these terms separately.²⁸ This scrutiny, however, has been conducted with no indication of which analytical method was being imposed. The existing circuit split over the interpretation of "based upon" makes the PDJB a timely subject for consideration under a linguistic model.

In the past, academics with formal training in law and linguistics have often shied away from the use of linguistics as a decision rule in the judicial process.²⁹ Perhaps more to the point, there has been (and remains) great concern that judges will—and often do—apply incorrect linguistic analysis to the case at hand, making it appear that their

done by syntax in written speech. See Richard A. Rhodes, *Scope in Discourse: Pragmatics or Syntax?*, in COOPERATING WITH WRITTEN TEXTS: THE PRAGMATICS AND COMPREHENSION OF WRITTEN TEXTS 589 (Dieter Stein ed., 1992).

²⁶ Indeed, the judiciary has become so accustomed to considering economic testimony on lost wages that even extremely speculative testimony has been admitted. Consider the following example:

When calculating the lost wages of a college student who died in a rollover accident—and whose parents say he planned to become a lawyer—a federal judge has ruled that an economic expert witness may be allowed to testify that one possible calculation of his lost wages would be premised on a lifelong career as a practicing lawyer—possibly up to the age of 89.

Shannon P. Duffy, *Testimony on Lost Wages OK'd in Fatal Accident Case*, LEGAL INTELLIGENCER, May 10, 2006, at 1.

²⁷ *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1407-09 (2007).

²⁸ See *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 653-54 (D.C. Cir. 1994) (considering the definitions of "allegations" and "transactions" and positing an algebraic formula for determining if either exists).

²⁹ See, e.g., LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 178 (1993) ("[W]hen judges choose to rely on linguistic argumentation to justify their decisions, incoherence will quickly become the rule . . .").

decision is grounded in plain meaning when in fact neither intuition nor scientific analysis of the text supports the decision.³⁰ This problem is compounded when the level of “linguistic analysis” performed by courts rarely rises above “dictionary shopping.”³¹ However, the fact remains that the Supreme Court is moving in the direction of plain-meaning analysis.³² Any argument against the use of plain meaning, given the Court’s current support for this technique, would be an exercise in futility.³³ One could have made similar arguments against judicial reasoning from economics—the other modern social science recently given an opportunity to transform judicial thinking—as early methods applied by judges were quite crude.³⁴ These early attempts at increasing the analytical rigor of judicial decisions have, however, produced an entire field of study and a significant increase in judicial understanding of economic principles.³⁵

³⁰ Professor Solan refers to this tendency as a “temptation” to avoid writing difficult decisions. *See id.* at 187 (“[I]f judges were to accept a few more of these opportunities [to avoid interpretive difficulties], breaking away from this temptation, I believe along with many others that our judicial system would ultimately be well served.”).

³¹ *See* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 297-300 (1998) (considering the ramifications of judicial use of dictionary definitions and the pitfalls of selecting between different dictionaries and definitions).

³² *See Looking It Up*, *supra* note 18, at 1440-42.

³³ Indeed, it appears that scholars are recognizing the Court’s devotion to the plain-meaning rule and accepting that judges ought to be educated about linguistics, rather than advised to avoid it. *See generally* LAWRENCE M. SOLAN & PETER M. TIERSMA, *SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE* (2005) (considering various linguistic and psycholinguistic aspects of American criminal law and expressing a desire to improve the system by enhancing the understanding of human linguistic ability).

³⁴ Consider *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (*italics added*), in which Judge Learned Hand set forth the famous “Learned Hand Formula”: “if the probability be called *P*; the injury, *L*; and the burden, *B*; liability depends upon whether *B* is less than *L* multiplied by *P*: i.e., whether $B < PL$.” This is a very crude cost-benefit model and is almost entirely impracticable in most negligence cases, yet it proved revolutionary in jurisprudential thought in tort law.

³⁵ The current state of law and economics is not, however, beyond criticism. Indeed, one astute critique—that an economic perspective on law is not necessarily an objective perspective—applies with equal force to legal linguistic analysis. *See, e.g.*, Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383, 412 (2003) (“In the United States today, law and economics has been finally unseated from the throne of legal objectivity, so that its normative recipes need a new contingent and local legitimization in order to compete with those of a variety of opposite political strategies.”).

The strong public sense that judges should uphold the law “as written,”³⁶ and not “legislate from the bench,”³⁷ supports the use of linguistics as a decision mechanism. This public pressure can encourage judges to rely on incorrect linguistic judgments in order to base a decision on a seemingly unassailable premise: that the judge was deciding not who was right or wrong, but what Congress had actually enacted—thus binding the judge’s hand.³⁸ But public sentiment also fundamentally supports a rigorous linguistic framework for statutory construction. While formally correct linguistic analysis cannot provide resolution to all questions of interpretation, it can provide guidance in the way that proper economic analysis provides guidance—by limiting the number of possible outcomes and identifying those that are analytically sound.

A simple example demonstrates why linguistic interpretation cannot provide an independently conclusive tool in construing statutes. Consider a law that provides for no syntactic ambiguity of interpretation: “Thou shalt not kill.”³⁹ This law follows a very simple tree structure⁴⁰ and allows for only one syntactic reading⁴¹: the subject, “thou,” is prohibited from “killing.” Whether a defendant has violated this law will, however, depend upon the semantic and pragmatic interpretation of “kill.” Will majority and dissenting opinions argue over

³⁶ Note that in certain cases, however, public opinion is for judicial rewriting of the law precisely *because* the text as written is unambiguously in conflict with the statutory purpose. The most obvious example of this is the “and/or rule,” by which judges may read whichever conjunction actually performs the work intended by the legislature. See SOLAN, *supra* note 29, at 45-55 (discussing the and/or rule in depth).

³⁷ See Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 195-97 (2007) (noting the increasing use of the buzz phrase “legislating from the bench” in Congress).

³⁸ As Solan has argued,

[T]he deck is not only stacked linguistically. To the extent necessary to achieve certain results, technical analysis of the language is abandoned entirely in favor of broad policy considerations. Perhaps the decisions in all of these cases are the best ones possible under the circumstances. Even if we assume so, the result is reached at the expense of selective use of linguistic analysis in such a way as to compromise the analytical integrity of the system producing the decisions.

SOLAN, *supra* note 29, at 87.

³⁹ Exodus 20:13 (King James).

⁴⁰ For an explanation of tree structures, see *infra* Part II.B.

⁴¹ This statement is a small fib. The attachment of the negative “not” to the tree may be ambiguous, but not in such a way as to affect the meaning. That is, the tree could connect “not” with “shalt” or with “kill,” but in either structure the overall meaning remains the same.

whether the meaning is “to deprive of life: put to death: cause the death of”⁴² or “to slaughter . . . for food”?⁴³ Will the putative court note the profound lack of restriction of “kill” to the act of ending a *human* life? It is hard to imagine that the biblical commandment contemplates extension of the rule beyond the killing of a human—particularly given the Bible’s earlier grant to man of “dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.”⁴⁴ While linguistic analysis can go as far as construing the problem as one of defining “kill,” the ultimate resolution of this question must come from elsewhere. Thus, even the simplest case of apparent plain meaning must be informed by more than the text presented. The overall statutory framework, its stated purpose, and whatever else can be gathered of legislative intent must be considered in making an informed decision.

B. *The Model*

In conducting statutory interpretation, the modern Supreme Court has shown a propensity toward textualist argument, as exemplified in Chief Justice Rehnquist’s remark that “the plain language of the enacted text is the best indicator of intent.”⁴⁵ At the same time, there is no traditional or established judicial framework from which to discern plain meaning. At the outset, there are effectively three options: (1) the dictionary approach, (2) the intuitive-meaning approach, and (3) the analytical-syntax-and-semantics approach.

The first of these methods is the one used most often by the courts—or, rather, it is the method of analysis most often explicitly acknowledged by the courts.⁴⁶ As previously mentioned, the modern

⁴² WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1242 (2002).

⁴³ *Id.*

⁴⁴ *Genesis* 1:26 (King James). Invoking this separate section of the Bible recalls the statutory canon that one section of law should not be read to render another section superfluous. This canon is referenced in at least one case dealing with the PDJB, as discussed *infra* note 81.

⁴⁵ *Nixon v. United States*, 506 U.S. 224, 232 (1993).

⁴⁶ See Lawrence M. Solan, *Finding Ordinary Meaning in the Dictionary*, in *LANGUAGE AND THE LAW* 255, 277-78 (Marlyn Robinson ed., 2003) (noting the increasing reliance on dictionaries as tools for determining the ordinary meaning of statutory language). Note, however, that explicit acknowledgement of a mode of analysis may not indicate that it is the true basis for a decision. See *id.* at 258 (“[The use of dictionary definitions] stops making sense when the dictionary definition is either more or less precise than the word’s ordinary meaning. When that happens, judicial resort to the diction-

Supreme Court has markedly increased over previous Courts its citations to dictionaries.⁴⁷ The second method, intuitive interpretation, is, however, likely the most common method of analysis actually employed by the Court. While it is rarely, if ever, explicitly noted, intuitive interpretation accounts for the vast majority of how all law—and indeed, all speech—is analyzed. This reliance on intuitive interpretation is necessary because technical analysis of every phrase, as required by the dictionary approach, would be impractical.

The function of speech is to convey meaning, and the purpose of codified law is to communicate the rules of society in a knowable form.⁴⁸ The philosophical goal of written law—to provide fixed societal structure—depends primarily upon the knowability of the law.⁴⁹ Written law can provide structure only if the law is understood as having a particular meaning by those who read it.⁵⁰ This understood meaning, in turn, rests upon the ability of the written law to convey meaning through language.⁵¹

The importance of intuition to legal-language interpretation should not be understated. It is easy to lose sight of the intuitive nature of language in the midst of cases turning on “precise” lexicographical definitions. A famous example is President Clinton’s questioning of the meaning of the word “is” before a grand jury.⁵² When,

ary becomes nothing more than a vehicle for masking the exercise of judicial discretion.”).

⁴⁷ See *Looking It Up*, *supra* note 18, at 1438-39.

⁴⁸ Cf. PETER M. TIERSMA, *LEGAL LANGUAGE* 36-40 (1999) (discussing the printing press’s role in shifting the foundation for the meaning of English law from common understanding to the written text).

⁴⁹ See Dolores A. Donovan, *Codification in Developing Nations: Ritual and Symbol in Cambodia and Indonesia*, 31 U.C. DAVIS L. REV. 693, 706-07 (1998) (“[I]t would be difficult to take issue with Aristotle, Grotius, and Portalis, that the purpose of written law is social ordering . . .” (citing ARISTOTLE’S POLITICS 51-52 (Benjamin Jowett trans., Random House 1943) (350 B.C.))).

⁵⁰ Or, at the very least, the law must be understood by those who enforce it. The adage that “ignorance of the law is no excuse” implies that—so long as the law is understood by governmental actors—laws can be enforced to police society regardless of public awareness. In an intuitive sense, however, laws are much more effective in social ordering if the public is aware of their general content *ex ante*, rather than being informed of a legal requirement only during *ex post* judicial proceedings resulting from a lack of social order.

⁵¹ See, e.g., Philip Marshall Brown, *The Codification of International Law*, 29 AM. J. INT’L L. 25, 25 (1935) (considering dictionary definitions of “codification” in explaining the value of written law).

⁵² Kenneth Starr recounted President Clinton’s testimony in his report to Congress:

however, attention is not explicitly called to the imprecision and ambiguities of language, our natural inclination is to accept our linguistic intuition at face value.⁵³ The trouble with linguistic intuition, though, is that it is highly personal; we have no real way of determining whether one person's interpretation of a phrase or sentence is "correct" in the sense that it is honestly what the interpreter believes it to mean. Thus, the intuitive meaning of a law is likely to be enforced in a case in which there is agreement among the parties as to what the law means, and not in cases in which the meaning of the law is contested.⁵⁴ This proposition is borne out in federal case law.⁵⁵

It depends on what the meaning of the word "is" is. If . . . "is" means is and never has been, . . . that is one thing. If it means there is none, that was a completely true statement. . . . Now, if someone had asked me on that day, are you having any kind of sexual relations with Ms. Lewinsky, that is, asked me a question in the present tense, I would have said no. And it would have been completely true.

OFFICE OF THE INDEPENDENT COUNSEL, REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, § 595(C) n.1091 (1998), *reprinted in* THE STARR REPORT: THE FINDINGS OF INDEPENDENT COUNSEL KENNETH W. STARR ON PRESIDENT CLINTON AND THE LEWINSKY AFFAIR 325 n.1091 (PublicAffairs 1998).

⁵³ Our ability to make these intuitive judgments is a matter of considerable study. See JACKENDOFF, *supra* note 22, at 48-49 (analogizing intuitive judgments that a sentence is ungrammatical to intuitive knowledge that certain drawn structures are physically impossible). The act of determining a sentence as grammatical or not is known as "marking."

⁵⁴ It is important to note that, even in an utterly honest society, intuitive interpretation of the law would not resolve every problem. Ambiguities are prevalent in human language, such that even if parties agree that different readings are possible, they will likely disagree as to whether one or another reading is in fact the law. Further, the mere fact that an individual understands a phrase to have a certain meaning cannot be proof that the individual responsible for uttering the phrase intended that meaning. Take, for example, the term "waters" in the Clean Water Act, which can be interpreted in several ways. In *Rapanos*, there was no argument between the various court opinions over whether the different Justices' interpretations were possible, but rather whether they were the most appropriate. One footnote in Justice Scalia's opinion is of particular note:

Justice Kennedy observes that the dictionary approves an alternative, somewhat poetic usage of "waters" as connoting "[a] flood or inundation; as the *waters* have fallen. . . ." It seems to us wholly unreasonable to interpret the statute as regulating only "floods" and "inundations" rather than traditional waterways—and strange to suppose that Congress had waxed Shakespearean in the definition section of an otherwise prosaic, indeed downright tedious, statute. The duller and more commonplace meaning is obviously intended.

Rapanos v. United States, 547 U.S. 715, 732 n.4 (2006) (plurality opinion) (bracketed alteration in original) (citations omitted).

Given the incentives to distort the meaning of legal language, a mechanism by which strained or impossible interpretations of language can be rejected seems desirable. Modern linguistic theory, with its emphasis on natural understanding, provides such a mechanism. There is a wealth of research in linguistics that is founded, essentially, upon the immediate reactions of listeners to various sentences as “grammatical” or “ungrammatical”—or, more simply, what “sounds right.”⁵⁶ By analyzing sentences deemed grammatical and ungrammatical, researchers have uncovered patterns in intuitive understanding of language.⁵⁷ These patterns led to the discovery of rules and structures governing human language and have developed into a body of knowledge concerning what real-world statements actually mean.

Perhaps the most important linguistic tool for uncovering the meaning of sentences is the syntax tree, which can relate a great deal of information regarding the relationships between words in a sentence.⁵⁸ While the flow of words in speech and on the page is linear, linguistic analysis shows that our thought process in interpreting speech is hierarchical.⁵⁹ One can think of the tree as a more evolved version of the grade-school sentence diagram. Each word is assigned a category, and connections are drawn between neighboring words in a branching structure according to the relationship between the words of the sentence. The resulting structure bears a resemblance to an upside-down tree—hence the name. For example, the phrase “the sky is blue” is diagrammed as follows:

⁵⁵ For example, the parties in *Rockwell International Corp. v. United States* agreed that “the phrase ‘information on which the allegations are based’ refer[red] to the information on which the *relator’s* allegations are based.” 127 S. Ct. 1397, 1407 (2007). This agreement informed the Court’s acceptance of that reading in the face of structural and semantic ambiguity. Conversely, courts may invent “ambiguity” where none exists. See *infra* note 90 (discussing the Third Circuit’s finding of syntactic ambiguity in the FCA jurisdictional bar not because the language is ambiguous, but because the authors could have chosen different language).

⁵⁶ See JACKENDOFF, *supra* note 22, at 48-49 (providing examples of how grammatical/ungrammatical linguistic marking works).

⁵⁷ See, e.g., ELIZABETH A. COWPER, A CONCISE INTRODUCTION TO SYNTACTIC THEORY: THE GOVERNMENT-BINDING APPROACH 1-6 (1992).

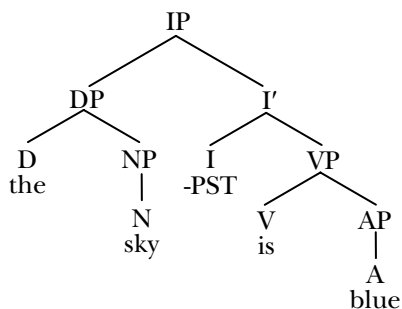
⁵⁸ See, e.g., NOAM CHOMSKY, SYNTACTIC STRUCTURES ch. 4 (12th prtng. 1976) (outlining basic phrase structure and tree diagrams). Alternatively, some modern theorists have tried to “flatten” syntactic analysis—though even these methods require a certain level of hierarchical tree structuring. See, e.g., PETER W. CULICOVER & RAY JACKENDOFF, SIMPLER SYNTAX ch. 4 (2005) (describing a reduced-hierarchy syntax model that retains a good deal of hierarchical structure).

⁵⁹ See sources cited *supra* note 58.

Figure 1: A Simple Sentence Diagram⁶⁰

D	N	V	Adj.
The	sky	is	blue.

The same phrase is represented by the following tree structure:

Figure 2: A Simple Sentence Tree⁶¹

By determining the hierarchical structure of a text, it is possible to determine the various readings that the text might allow. Put negatively, the tree is often persuasive evidence that a proposed reading is not, in fact, possible. For example, the sentence “Paul served dinner to him” cannot mean that Paul served himself dinner, solely because the structure of the sentence precludes Paul serving as the antecedent of “him.” To see that only structure can account for this, consider that “Paul’s friend served dinner to him” is ambiguous: the reader doesn’t know whether “him” refers to Paul or another male.⁶²

⁶⁰ In this diagram, the word “the” is marked with a “D” rather than the familiar “Art.” for article. In linguistics literature, words such as “the” are referred to as “determiners” rather than articles. See, e.g., VICTORIA FROMKIN & ROBERT RODMAN, AN INTRODUCTION TO LANGUAGE 67 (6th ed. 1998) (noting that “the articles *the* and *a/an* [are] part of the class of determiners”).

⁶¹ In the tree, branches are called “nodes” and are labeled with a marker that denotes what role the node plays in the cognitive process of determining meaning. These markers are derived from the category of the “head” element, which is the noun, verb, determiner, adjective, etc., that, in English, is the upper-leftmost element in the node. Thus, “IP” stands for “inflection phrase”; “I” stand for inflection; “DP” stands for “determiner phrase”; “NP” stands for “noun phrase”; “VP” stands for “verb phrase”; PST stands for “past tense” (in this figure, marked with a negative sign to denote present tense); and “AP” stands for “adjective phrase.” The prime notation indicates an intermediary node. In later diagrams, “PP” stands for “prepositional phrase,” and “OrP” stands for “‘or’ phrase.”

⁶² See generally COWPER, *supra* note 57, at 152-55 (developing binding theory, which describes the licensing of pronouns and their coreferents).

For slightly more complex sentences, the syntax trees may reveal *structural* ambiguities. In these cases, the syntax tree is not unique, but rather may take one of two or more forms. For example, consider the sentence “Sherlock saw the man using binoculars.”⁶³ Without further context, this sentence may mean that Sherlock witnessed a man who was using binoculars, or that Sherlock himself used binoculars to spy on the man. The following two trees illustrate each case:

Figure 3: The Man Using Binoculars

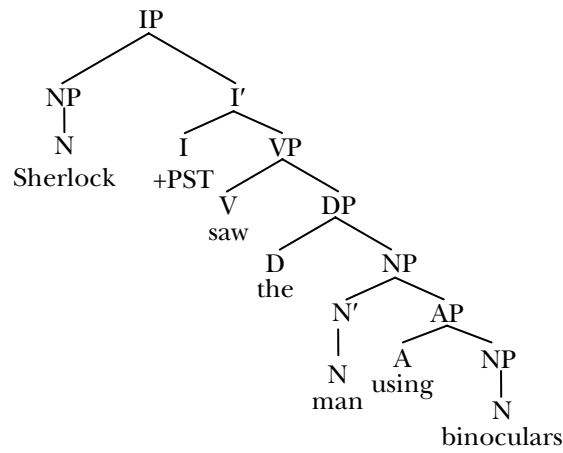
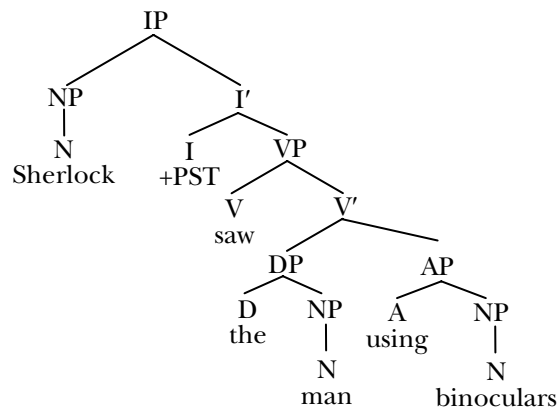


Figure 4: Sherlock Using Binoculars



⁶³ This example, and the analysis of its structural ambiguity, is borrowed from Tamina Stephenson, 24.900 Mini-Lecture on Semantics I (Mar. 14, 2004), <http://>

As the syntax trees show, the ambiguity arises from the location of the attachment of the phrase “using binoculars” to the tree. Figure 3 illustrates that in the lower position, attached to the noun phrase (NP), “using binoculars” modifies “the man.” Figure 4 illustrates, however, that in the higher position, attached to the verb phrase (VP), “using binoculars” modifies “Sherlock.”⁶⁴ The ambiguity therefore does not arise from any variation in the *meaning* of “using binoculars,” but rather from the structure of the phrase itself.

In addition to the syntax tree, formal linguistics has produced a functional tool for dealing more directly with the meaning of individual words and phrases. Treating words as “functions,” linguistics has adopted the lambda calculus from formal logic as a tool for describing meanings of words and phrases as functional forms.⁶⁵ Combined with a hierarchical understanding of sentence structure, lambda calculus allows for thorough analysis of the meaning of phrases and sentences.

The accepted tools of formal linguistic analysis have proved valuable to the study of human language,⁶⁶ and they can be valuable tools for the interpretation of the law. Their integration into legal discourse is likely to increase understanding of the law, particularly in the context of plain-meaning analysis. In the judicial context, they may be viewed as analogous, in some respects, to the so-called “decision rules” that some scholars argue the Supreme Court employs in its constitutional analysis.⁶⁷ These decision rules are concrete, practica-

ocw.mit.edu/NR/rdonlyres/Linguistics-and-Philosophy/24-900Spring-2005 (follow link starting “IBB”; then follow “0” link; then follow “sem lecture.pdf” link).

⁶⁴ In a traditional grammatical sense, “using binoculars” here serves as an adverb, and therefore could be said to “modify” the verb “saw.” In a semantic sense, however, “saw” cannot be modified by “using binoculars,” because a non-entity cannot actually “use binoculars.” The reader must interpret that Sherlock is the individual using binoculars, thus “using binoculars” is correctly understood as modifying “Sherlock.” Cf. *id.* at 4-5.

⁶⁵ See, e.g., RONNIE CANN, *FORMAL SEMANTICS* 115-126 (1993) (explaining the use of lambda calculus in formal semantics); GENNARO CHIERCHIA & SALLY MCCONNELL-GINET, *MEANING AND GRAMMAR: AN INTRODUCTION TO SEMANTICS* ch. 7 (1990) (explaining the use of lambda abstraction in natural-language semantics). A full discussion of lambda calculus is beyond the scope of this Comment.

⁶⁶ To see how linguistic tools have changed in the recent past, while producing valuable insights in all incarnations, compare CHOMSKY, *supra* note 58, at 26-33, with CULICOVER & JACKENDOFF, *supra* note 58, at 108-48.

⁶⁷ See, e.g., Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 167 (2004) (outlining the “decision rules” model of constitutional theory, which argues that the rules used to make decisions are separate from the underlying “operative propositions” of the Constitution).

ble rules that seek to put the abstract “operative propositions”⁶⁸ of the Constitution into effect—for example, applying “strict scrutiny” (a decision rule) as a means to give effect to “equal protection” (an operative proposition).⁶⁹ Just as decision rules cannot precisely track operative propositions⁷⁰—for the simple reason that the rules have to be practical, while propositions preserve a more abstract notion of jurisprudence—the linguistic tools available to study human language do not necessarily describe human language faculties with complete accuracy. This lack of precise fit is not an impediment to the use of the model; rather, it is an admonishment to remember that the model is not necessarily reality. As with any tool, linguistic analysis should be seen as one factor in statutory construction, and not the entirety of the process.⁷¹

C. *Application of the Model to the PDJB*

Having established a rigorous framework from which to determine the meaning of the PDJB, it is now possible to consider the merits of the rules proposed to interpret the law. The PDJB states that “[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions.”⁷² The majority of courts interpret this to mean that the action is supported by the same information that has been disclosed.⁷³ The minority rule requires that, in addition to satisfying the majority rule, the action be “actually derived from such information.”⁷⁴ The Seventh Circuit, in deciding *Fowler*, claimed that its minority interpretation of

⁶⁸ *Id.* at 9.

⁶⁹ See Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1676-80 (2005).

⁷⁰ See *id.* at 1658-67 (providing factors that contribute to divergence between operative principles and decision rules).

⁷¹ Though Professor Solan would generally have judges avoid linguistic arguments altogether, his analysis of the “and/or rule” shows an acceptance that linguistic phenomena play a real role in understanding the law. See SOLAN, *supra* note 29, at 53-55. For an explanation of how linguistic analysis—and, by extension, “plain meaning”—cannot provide full answers in virtually any case, see *supra* notes 39-44 and accompanying text.

⁷² 31 U.S.C. § 3730(e)(4)(A) (2006).

⁷³ For a full list of opinions adopting this rule, see *supra* note 5.

⁷⁴ *United States ex rel. Fowler v. Caremark Rx, L.L.C.*, 496 F.3d 730, 737 (7th Cir. 2007) (quoting *United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 497 (7th Cir. 2003)), *cert. denied*, 128 S. Ct. 1246 (2008).

the FCA jurisdictional bar, also adopted by the Fourth Circuit,⁷⁵ “holds the trump card, the plain language interpretation.”⁷⁶ As presented in *Fowler*, this claim bears no support beyond its bald assertion. The goal of this section is to provide the Seventh Circuit’s missing linguistic analysis, which ultimately supports its assertion. This analysis requires two steps: first, a semantic construction of the phrase “based upon” to discern its correct meaning, and second, a construction of the phrase’s syntactic structure in order to identify each element’s role and its relation to each other element.

1. Determining the Semantic Content of “Based Upon”

Beginning with the phrase “based upon,” the most natural instinct of a reviewing court would of course be to look up the contested phrase in a dictionary.⁷⁷ Interestingly, *Black’s Law Dictionary* provides a legal definition for the phrase “based on” in the realm of copyright law: “Derived from, and therefore similar to, an earlier work.”⁷⁸ *Webster’s Third New International Dictionary* provides the following, which is of little help: “to use as a base or basis for . . . used with *on* or *upon*.”⁷⁹ “Base”—the noun—is, in turn, defined as “foundation,” among other

⁷⁵ See *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1349 (4th Cir. 1994) (“[W]e hold that [qui tam plaintiff] Siller’s action was only ‘based upon’ the disclosures in the SSI lawsuit if Siller actually derived his allegations against [defendant] BD from the SSI complaint.”).

⁷⁶ *Fowler*, 496 F.3d at 738; see also *Siller*, 21 F.3d at 1349 (“We are unfamiliar with any usage, let alone a common one or a dictionary definition, that suggests that ‘based upon’ can mean ‘supported by.’ [We prefer] the plain meaning of the words enacted by Congress over our sister Circuits’ as-yet unconsidered assumptions as to the meaning of those words . . .”).

⁷⁷ See *Cler v. Ill. Educ. Ass’n*, 423 F.3d 726, 731 (7th Cir. 2005) (“[W]e will ‘frequently look to dictionaries to determine the plain meaning of words.’” (quoting *Sanders v. Jackson*, 209 F.3d 998, 1000 (7th Cir. 2000))); *Thompson v. Goetzmann*, 337 F.3d 489, 497 n.20 (5th Cir. 2003) (“Dictionaries are a principle source for ascertaining the ordinary meaning of statutory language.”); *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1223 (11th Cir. 2001) (“[T]o determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance.”); *Looking It Up*, *supra* note 18, at 1438-40 (noting the Supreme Court’s increasing reliance on dictionaries).

⁷⁸ BLACK’S LAW DICTIONARY 160 (8th ed. 2004). Interestingly, this definition is directly supportive of the Fourth and Seventh Circuits’ minority rule—more so, even, than the *Webster’s* definition.

⁷⁹ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 180 (2002). Interestingly, *The Chicago Manual of Style* prefers not to use “upon” with “based.” THE CHICAGO MANUAL OF STYLE ¶ 5.209 (15th ed. 2003). We can safely assume, however, that this stylistic preference does not lend a difference in interpretation to the phrase.

entries.⁸⁰ This is, however, precisely where intuition would guide the court in any event. This definition does no work in determining whether a lawsuit brought by a *qui tam* litigant can be heard. The court already knows that the question is one of the foundational information supporting the claim; what it does not know is when that information supports a claim and when it does not. Indeed, the problem seems to stem from whether it is linguistically correct to look past “public disclosure of” and jump straight to “allegations or transactions” in determining what the action is “based upon.”⁸¹

The point of this investigation is to underscore that the circuit split is not so much a question of the meaning of “based upon” as it is of the function that this well-understood phrase plays in a larger context. Thus, the question of “plain meaning” *must* be a deeper issue than can be resolved by simple dictionary definitions. The Seventh and Fourth Circuits are adamant in their position that “plain meaning” supports their view, but the dictionary alone has not borne this out.

All is not lost for this small phrase, however. It will be helpful, once we have the full hierarchical structure of the larger phrases worked out, to be able to plug the structure into a function that can tell us the meaning of the phrase. This analysis assumes the “derived from” definition, which is supported directly by the Seventh⁸² and Fourth Circuits,⁸³ and noted with some approval even by courts adopt-

⁸⁰ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 180 (2002).

⁸¹ For an argument that this jump to “allegations or transactions” is indeed proper, see *Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1044-47 (8th Cir. 2002). The Eighth Circuit acknowledges that the wording of the statute directly implies the Fourth and Seventh Circuits' reading, but it argues that the wording is simply inartful—while simultaneously arguing that it is “inconceivable that Congress would have drafted the statute so poorly as to have included a provision that could never have any effect.” *Id.* at 1045. Here, the court is referring to the concern that reading the bar as banning only actions *derived from* public disclosures would render the original-source provision useless. *Id.* The reasoning assumes that the original source's action will (allegedly) always be based on the underlying information, not the actual public disclosure. *Id.* This interpretation suffers from a narrowness of vision—it assumes that if an action is derived directly from a set of facts, it cannot also be derived from the public release of those facts. However, the case itself likely concerns the precise allegations released publicly by the litigant, thereby making the basis of the case the allegations themselves, as well as the facts that support them.

⁸² See *United States ex rel. Fowler v. Caremark Rx, L.L.C.*, 496 F.3d 730, 736-39 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1246 (2008).

⁸³ See *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347-49 (4th Cir. 1994).

ing the majority rule, notably the Eighth⁸⁴ and Third⁸⁵ Circuits. Adopting this definition, we can formulate a lambda-calculus function for “based upon” in the following way:

$$||\text{based upon}|| = \{\lambda(X,Y): X \text{ is derived from } Y\}$$

That is, “based upon” is a function that takes two arguments—one that is to the left of “based upon” in the sentence (X), and one to the right (Y)—and returns the set of all possible worlds in which the argument to the left is derived from the argument to the right. The following tree structures will determine what can be the left- and right-hand arguments for “based upon.” The analysis begins with the right-hand argument, as that is the portion of the PDJB that has created the most controversy.

2. Building the Syntactic Structure

a. *The Right-Hand Argument of “Based Upon”*

To begin studying a phrase—and derive the hierarchical structure—it is helpful to break the phrase down into “constituent phrases.” Constituent phrases are segments of sentences that can be naturally spoken independently from the sentence while retaining their meaning.⁸⁶ Thus, the language of 31 U.S.C. § 3730(e)(4)(A) relevant to the circuit split can be productively broken down into the three following constituent phrases:

1. “allegations or transactions”;
2. “the public disclosure of allegations or transactions”; and
3. “based upon the public disclosure of allegations or transactions.”

⁸⁴ See *Minn. Ass’n of Nurse Anesthetists*, 276 F.3d at 1045-46. The Eighth Circuit also notes that “[t]he split of authority is not quite as lopsided as it seems, for the issue has provoked spirited disagreements in some circuits that have adopted the majority view.” *Id.* at 1045 n.8.

⁸⁵ See *United States ex rel. Mistick PBT v. Hous. Auth.*, 186 F.3d 376, 385-86 (3d Cir. 1999) (“[A] relator’s action is ‘based upon’ a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his qui tam action is based.”).

⁸⁶ See, e.g., FROMKIN & RODMAN, *supra* note 60, at 112 (discussing constituent phrases as evidence of hierarchical structure).

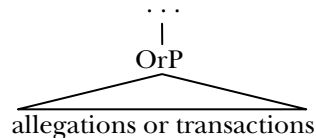
These three phrases will frame the analysis of the “plain meaning” of the FCA jurisdictional bar. Tellingly, the phrase “based upon,” standing alone, is not an independently meaningful phrase, which further confirms that the semantic definition, above, of “based upon” as a function is correct—as a function, its meaning depends on its context.

i. “Allegations or Transactions”

The “allegations or transactions” mentioned in the PDJB constitutes the smallest independently understandable phrase in the bar. The meaning of “allegations or transactions” does not depend on the immediate context of the sentence, but rather on the context of the statute as a whole and on court decisions interpreting it.⁸⁷ The precise meaning of “allegations or transactions” is not particularly relevant to this inquiry, as our question is whether the PDJB precludes actions “based upon” the “allegations or transactions” themselves or their “public disclosure.”

For reasons of space, this analysis will ignore any internal structure to the “or” construction in this phrase. The entire phrase will be considered an OrP (for “‘or’ phrase”), and the existence of a more complicated internal structure will be marked by a closed triangular branch between the phrase and the elements, as shown below.⁸⁸

Figure 5: Tree Structure of “Allegations or Transactions”



ii. “The Public Disclosure of Allegations or Transactions”

Expanding our view of the statute slightly to include the noun “the public disclosure,” the meaning starts to crystallize. To illustrate this phenomenon visually, consider the following tree representation:

⁸⁷ See cases cited *supra* notes 27-28 and accompanying text.

⁸⁸ See RADFORD, *supra* note 2, at 54 (“[I]t is quite common to use a ‘triangle’ to represent constituents with a complex internal structure that you don’t choose to represent.”).

Figure 6: Tree Structure of “the Public Disclosure of Allegations or Transactions”

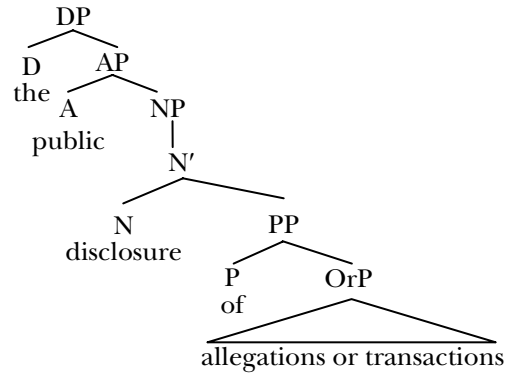


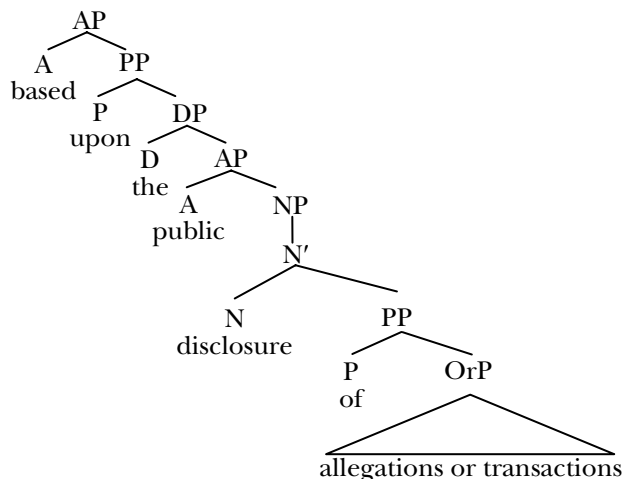
Figure 6 shows the hierarchical relationship between the noun, “disclosure,” and the prepositional phrase, “of allegations or transactions.” In linguistic terms, the prepositional phrase is a “complement” to the noun phrase, and its contribution to the sentence is encapsulated in its relationship to the noun phrase.⁸⁹ Here, “of allegations or transactions” singles out those particular public disclosures that concern the reader. This point may seem obvious, but it is nevertheless essential to a proper interpretation of the statutory language.

iii. “Based Upon the Public Disclosure of Allegations or Transactions”

Finally, Figure 7 below shows the tree structure for the largest constituent phrase, “based upon the public disclosure of allegations or transactions.” As Figure 7 illustrates, the structure continues upward hierarchically. The structure makes clear that the adjective “based” takes a prepositional phrase as its object, here headed by “upon.” This prepositional phrase in turn takes an object, in this case “the public disclosure of allegations or transactions.” Simplifying slightly, the phrase “based upon” takes an object, which here consists of a certain subset of “public disclosures,” relating to “allegations or transactions.”

⁸⁹ See *id.* at 175-79 (developing the notion of “complements” and differentiating between complements and “adjuncts”—a fascinating distinction, but one that does not bear on this analysis).

Figure 6: Tree Structure of “Based Upon the Public Disclosure of Allegations or Transactions”



The tree structure of the PDJB further reveals that the phrase leaves no room for structural ambiguity. Importantly, it is impossible for the phrase “allegations or transactions” to attach higher than “public disclosure,” which therefore precludes a reading in which “based upon” takes “allegations or transactions” as its object, bypassing “public disclosure” or relegating it to an adjectival role.⁹⁰

b. *The Left-Hand Argument of “Based Upon”*

Interestingly, there are a few instances of structural ambiguity in the PDJB—two attachment-height ambiguities similar to the ambiguity

⁹⁰ An interesting criticism of this conclusion comes from the Third Circuit:

In light of this apparent lack of precision, we are hesitant to attach too much significance to a fine parsing of the syntax of § 3730(e)(4)(A). We find Section 3730(e)(4)(A) to be syntactically ambiguous because we are uncertain that the drafters of that provision focused on the difference in precise usage between, on the one hand, a suit based upon a public disclosure of an allegation or transaction and, on the other, a suit based upon an allegation or transaction and that has been publicly disclosed.

Mistick, 186 F.3d at 388. While the Third Circuit’s criticism is on point with this Comment’s analysis, it is somewhat questionable, as it finds ambiguity not because of any actual syntactic ambiguity, but because the drafters could have chosen an alternative syntax. This argument is contradictory: given the option between two unambiguous syntactic expressions, even a careless choice of one over another should be considered a resolution of the supposed ambiguity.

in the “Sherlock” example discussed above,⁹¹ one of which relates to the intuitively unambiguous left-hand argument of “based upon.” These ambiguities regard the attachment of the phrases “under this section” and “based upon the public disclosure of allegations or transactions.” The former is irrelevant to this discussion,⁹² but the latter directly relates to the phrase in question, and creates some potential confusion as to what the left-hand argument of “based upon” is.

Recall that the PDJB states that “[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions.”⁹³ As can be seen in the following two trees, it is syntactically unclear whether the “based upon” phrase modifies “jurisdiction” or “action”—that is, whether it is the basis of the jurisdiction or the basis of the action that is in question.

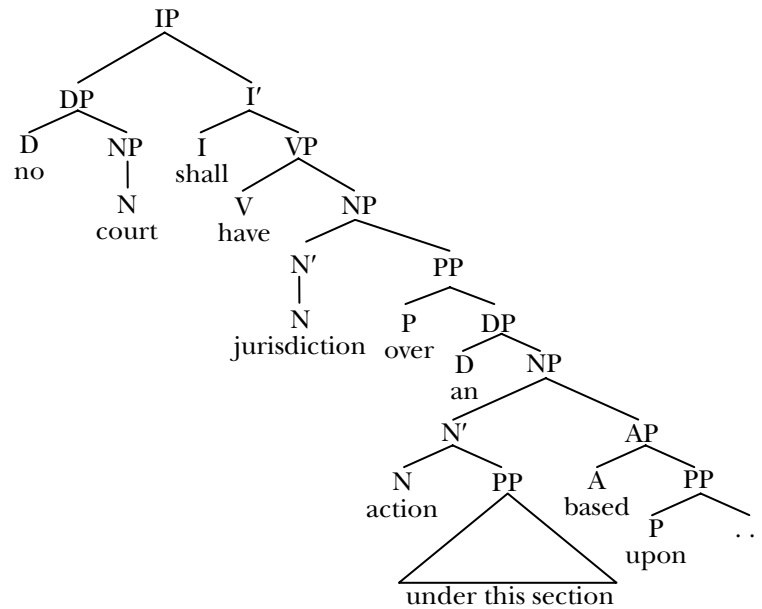
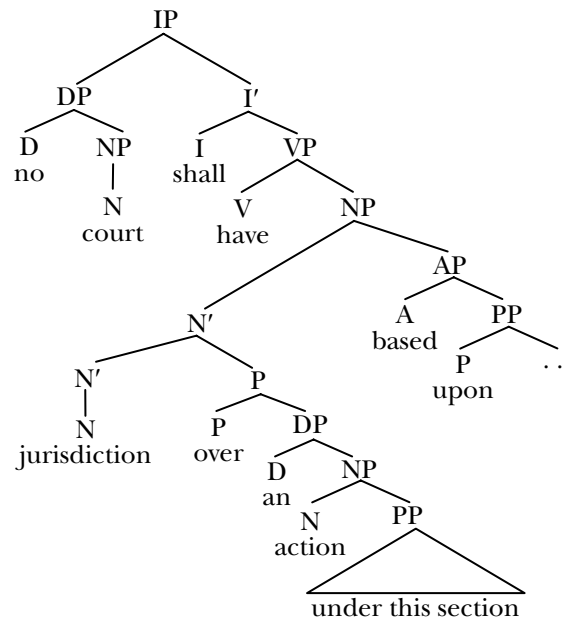
This ambiguity serves to highlight the importance of considering more than just “plain meaning” in construing statutes because, the structural ambiguity notwithstanding, the “based upon” phrase is not a confusing aspect of the sentence. The “action” in the PDJB is uncontestedly interpreted as being modified by the “based upon” phrase. This uniform interpretation is linguistically explainable. The phrase “an action based upon” (or, as here, “an action under this section based upon”) may be a legal idiom,⁹⁴ or it may be that “jurisdiction based upon the public disclosure” is so intuitively unlikely to be the intent of the “speaker” from the lawyer’s or judge’s position that it is discarded. But neither account offers further insight into the meaning of the law.

⁹¹ See *supra* notes 63-64 and accompanying text.

⁹² The ambiguity is whether “under this section” modifies “action” or “shall have jurisdiction.” For purposes of this discussion, it is assumed that it is the action that arises under this section, as jurisdiction is already provided by federal question jurisdiction unless specifically revoked.

⁹³ 31 U.S.C. § 3730(e)(4)(A) (2006).

⁹⁴ I am indebted to Professor David Pesetsky for pointing out this possibility. It is possible that in this idiomatic sense, the *idiom* “an action based upon” could actually carry the meaning “an action supported by,” and thereby make some sense of the Tenth Circuit’s declaration that “based upon” is understood to mean “supported by.” *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992); see also *infra* note 109 and accompanying text. This explanation does not fit, however, with the Tenth Circuit’s claim that its interpretation of “based upon” is the “common usage.” *Precision Co.*, 971 F.2d at 552. Regardless, the use of “an action based upon” as a legal idiom may warrant further investigation, though it is beyond the scope of this Comment. For a discussion of idioms and their importance to the development of linguistic theory, see RADFORD, *supra* note 2, at 319-20.

Figure 7: Tree Structure No. 1 of PDJB, “Action Based Upon”**Figure 8: Tree Structure No. 2 of PDJB, “Jurisdiction Based Upon”**

c. *Resolving the Meaning of the PDJB*

It is now possible to plug in the left- and right-hand arguments to the semantic definition derived above to arrive at the linguistic meaning of the PDJB. Recall that the definition was:

$\{\lambda(X,Y): X \text{ is derived from } Y\}$.

Plugging in the arguments derived above for *X* and *Y* provides:

$\{\lambda(\text{action, public disclosure}): \text{action is derived from public disclosure}\}$.

As can be seen, the PDJB “based upon” phrase directly relates the derivation of the action to the public disclosure, and not to the allegations or transactions.

Of course, all the foregoing linguistic analysis does no more than show that a natural English speaker’s intuition is correct. Though it validates the Seventh Circuit’s pronouncement that its interpretation is in fact the plain-language interpretation, this analysis does not address the argument noted by the Third Circuit that Congress was simply careless and intended the PDJB to be read either as regarding “the public disclosure of allegations or transactions” or “publicly disclosed allegations or transactions.” While humans make innumerable minor linguistic mistakes in phrasing regularly, the distinction between these two phrases is so marked as to preclude any indifference on the drafters’ part. Consider the following minor adjustments to these phrases:

1. No court shall have jurisdiction over an action based upon the public disclosure of murder.
2. No court shall have jurisdiction over an action based upon publicly disclosed murder.⁹⁵

The distinction between these two sentences should be clear to any native speaker of English—the first seems to be a valid act for the protection of witnesses to murders against charges going to their coming forward; the second is a nonsensical license to commit murder, so long as the perpetrator subsequently announces her guilt. That a leg-

⁹⁵ Once again, my thanks to Professor David Pesetsky for these examples.

islature could *possibly* confuse the two—or intend that a statute stating the former could be read in either way—seems absurd.

III. THE NONTEXTUAL RATIONALE FOR ADOPTING THE MINORITY RULE

The Fourth and Seventh Circuits' reading of "based upon" in the FCA jurisdictional bar is in fact supported by linguistic evidence as the plain meaning of the statute. The question, then, is whether the linguistic evidence—and the fact of plain meaning—fully justifies the adoption of this reading by the Supreme Court. Given the bar's purpose of preventing parasitic lawsuits while simultaneously encouraging whistleblowers,⁹⁶ the Fourth and Seventh Circuits' reading is supported both on linguistic and policy grounds, and it should be adopted.

A resolution to the interpretation of the jurisdictional bar must incorporate treatment not only of the linguistic plain-language interpretation, but also of the core policy behind the FCA and its jurisdictional bar. To this end, a full review of the various circuit opinions addressing the issue is in order.

A. *The Majority Case*

Among the rationales advanced for adopting the majority rule by the various circuit courts are the good, the bad, and the ugly.⁹⁷ The good reasons include the notions that the FCA contains "safeguards against [a] multiplicity of suits"⁹⁸ regarding the same fraud, that a restrictive reading serves the needs of judicial economy,⁹⁹ that finding more actions to be "based upon" public disclosures subjects them to the more important "original source" analysis,¹⁰⁰ and that "[o]nce the

⁹⁶ See *supra* text accompanying notes 3-4.

⁹⁷ With apologies to Sergio Leone.

⁹⁸ *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 567 (11th Cir. 1994).

⁹⁹ As the Tenth Circuit explains,

[A] more restrictive interpretation of "based upon" is consistent with practical considerations of judicial economy. It is one thing to expect the court to evaluate the quantity and quality of information in the public domain versus that possessed by the *qui tam* plaintiff after trial for purposes of fee determination; it is quite another to expect a similar evaluation as part of a pre-trial jurisdictional inquiry.

Precision, 971 F.2d at 553 (footnote omitted).

¹⁰⁰ *Cooper*, 19 F.3d at 568 n.10 (citing *Precision*, 971 F.2d at 552).

information is in the public domain, there is less need for a financial incentive to spur individuals into exposing frauds.”¹⁰¹

While the foregoing reasons are indeed good—that is, logically sound—there are countervailing reasons to adopt the minority interpretation that tend to weigh more heavily. As against the first reason, multiple suits stemming from the same fraud are not in fact prevented by the bar, so long as each *qui tam* litigant independently qualifies as an original source.¹⁰² Second, determining whether the plaintiff’s action is “based upon” a public disclosure is surely not more difficult than determining whether the plaintiff is an “original source”—and indeed, it may reduce the number of cases in which such original-source determinations need to be made. It is thus unclear that judicial economy is better served by the majority rule. Third, it is substantially unclear that the original-source determination is really more important than the “based upon” determination.¹⁰³ Finally, the notion that whistleblowing becomes less efficient once information is in the public domain is flawed on three counts: (1) the bar does not speak of information, but rather allegations and transactions;¹⁰⁴ (2) the public disclosure of allegations or transactions may not be readily or obviously attainable, even though public;¹⁰⁵ and (3) this position is entirely backwards looking—it does not account for the dampening effect on

¹⁰¹ *United States ex rel. Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675, 685 (D.C. Cir. 1997).

¹⁰² *See United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 410 (9th Cir. 1993) (“[T]here may be more than one original source eligible to bring suit . . .”).

¹⁰³ The Eleventh Circuit cites to a House Judiciary Committee hearing in arguing that the original-source provision is intended to play a large role in preventing parasitic suits while encouraging legitimate whistleblowing. *Cooper*, 19 F.3d at 568 n.10 (citing *False Claims Act Implementation: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 101st Cong. 5 (1990) (statement of Sen. Charles Grassley)). It is not clear, however, that Congress intended that the rest of the section be rendered subservient to that provision, or that Congress did not intend that both the “based upon” criteria *and* the original-source determination be used to that effect.

¹⁰⁴ This point is made in *United States ex rel. Springfield Terminal Railway. Co. v. Quinn*, 14 F.3d 645, 653 (D.C. Cir. 1994), but the opinion misstates the law as “bar[ring] suits based on publicly disclosed ‘allegations or transactions,’ not information,” converting the noun “disclosure” into the adjective “disclosed,” thereby obscuring the provision’s meaning.

¹⁰⁵ *See Springfield Terminal Ry. Co.*, 14 F.3d at 655 (“Expertise in the field of engineering would not in itself give a *qui tam* plaintiff the basis for suit when all the material elements of fraud are publicly available, though not readily comprehensible to nonexperts.”).

future whistleblowers who may fear that their own actions will be preempted by releases that they may not be able to predict or prevent.¹⁰⁶

The lone “bad” reason used to justify the majority rule is that “[t]he [FCA] jurisdictional requirements are designed to restrict the number of persons who can bring qui tam actions and thereby avoid parasitic suits.”¹⁰⁷ This reasoning is “bad” as a matter of logical reasoning: reducing the number of potential litigants is not a surefire way of reducing abuse. Consider a putative qui tam law that allows only the author of this Comment to bring qui tam actions. In such a case, virtually *every* qui tam action brought would be a parasitic action, in spite of the drastic reduction in the number of qui tam litigants.

Finally, there is the “ugly” reason—ugly in the sense that it falls into the category of linguistic claims that cause legal-linguistics scholars to shy away from linguistic decision making.¹⁰⁸ It posits a bold-faced lie about the plain meaning of the statute. The assertion is that “[a]s a matter of common usage, the phrase ‘based upon’ is properly understood to mean ‘supported by.’”¹⁰⁹ This construction of the phrase falls somewhere between the question at issue in the circuit split—the interpretation of “based upon”—and the question resolved by *Rockwell*—reliance in any part on public disclosure removes jurisdiction. That is, the court confuses the question of what “based upon” means with whether an action can depend upon both public disclo-

¹⁰⁶ It is possible, though perhaps far-fetched, to envision a case in which a potential qui tam plaintiff is about to “publicly disclose” information to the government when, by a sudden stroke of luck, the fraudulent actor discovers the whistleblower’s intent and moves immediately to disclose the information, thereby destroying the whistleblower’s cause of action. And, even in more pedestrian situations, the fear that part of the whistleblower’s claim depends upon some small piece of previously disclosed information—information that the whistleblower either does not at the outset know is public or does not know that she needs—may well deter her from coming forward. This is particularly true pursuant to *Rockwell International Corp. v. United States*, which destroys a whistleblower’s chance of recovery if her complaint, as amended, *ever* rests on public information. 127 S. Ct. 1397, 1408-09 (2007). Most importantly, because the problem of fraud is ongoing, it is like a repeated game—and if potential whistleblowers choose their strategy based on the outcomes attained by other whistleblowers, these failures of the system will only serve to make future whistleblowers less forthcoming. See generally DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* 146-60 (1991) (developing the theory of repeated games with observable actions).

¹⁰⁷ *United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 940 (6th Cir. 1997).

¹⁰⁸ See SOLAN, *supra* note 29, at 176 (noting the judicial tendency to disguise judgments made on other grounds as decisions forced by the language of the statute).

¹⁰⁹ *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992).

tures and independently obtained information. Because the court does not contemplate the distinction between these questions, it is forced to invent a bizarre new definition for the phrase “based upon”—thus “supported by.”

B. *The Minority Case*

The minority rule has been shown to be the plain meaning of the statute. This “derived from” interpretation, however, has more to recommend it than syntax trees and semantic functions—it also implements the statutory purpose. Considering the intent and purpose cited by virtually all of the circuit courts—“[s]eeking the golden mean between adequate incentives for whistle-blowing insiders . . . and discouragement of opportunistic plaintiffs”¹¹⁰—the minority rule is a fitting interpretation of the law. Further, if one adopts the textualist view that “[c]ongressional intent need be ascertained, if at all, from the plain language of the statute,”¹¹¹ then the linguistic evidence provided in favor of the minority view bolsters its case still further. Indeed, it is hard to determine how the “derived from” interpretation could lead to an increase in parasitic lawsuits, while it is easy to see that it can encourage whistleblowing.

Suppose, for example, that Willy Whistleblower wishes to expose the fraud of his employer, an insurance company, by using inside information that he has amassed for years. Suppose that, not knowing how best to proceed, Willy takes his case to the federal official who handles his company’s account.¹¹² On these facts, either of the two rules will allow Willy to bring action as an original source.¹¹³ Suppose

¹¹⁰ United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994).

¹¹¹ See, e.g., Coronado-Durazo v. INS, 123 F.3d 1322, 1327 (9th Cir. 1997) (Farris, J., dissenting).

¹¹² See, e.g., United States *ex rel.* Fowler v. Caremark Rx, L.L.C., 496 F.3d 730, 736 (7th Cir. 2007) (“Disclosure of information to a competent public official about an alleged false claim against the government [is a] public disclosure . . . when the disclosure is made to one who has managerial responsibility for the very claims being made.” (alteration in original) (quoting United States *ex rel.* Mathews v. Bank of Farmington, 166 F.3d 853, 861 (7th Cir. 1999))), *cert. denied*, 128 S. Ct. 1246 (2008).

¹¹³ This illustration highlights the fallacy promoted by *Minnesota Ass’n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1045 (8th Cir. 2002), discussed *supra* note 81, that the minority rule would render the original-source provision superfluous. Indeed, it is clear that in this case Willy’s entire action is “derived from” the very allegations that Willy himself made public—that is, Willy brought allegations of fraud to the attention of the public and then proceeded to base a lawsuit off of those allegations. The fact that Willy has independent knowledge of the facts underlying the

that the situation is changed slightly, however, such that Willy is still in possession of all the same information, but some sufficient amount of that information¹¹⁴ is made public by the company a few days prior to Willy's decision to act. Under the minority rule, Willy's cause of action remains good: he has not derived his suit from the public disclosure of allegations or transactions, so jurisdiction remains.¹¹⁵ Under the majority interpretation, however, Willy is now out of luck: his diligent recordkeeping and secrecy have been rendered meaningless by the malfeasant company's act. Despite the fact that Willy is still in the best position to bring suit on behalf of the government—he has been collecting information for years, while the federal authorities have probably not even read about this situation in the news—he is barred because he did not “play some part in the original public disclosure of the allegations made in his suit.”¹¹⁶ This outcome seems wrong in two ways. First, allowing the wrongdoer to prevent a whistleblower from profiting seems inequitable, and second, requiring potential whistleblowers to wade through all of the wrongdoer's public disclosures prior to filing suit would probably strongly discourage such behavior,¹¹⁷ in direct contradiction to the statutory purpose.

On the other hand, consider the case of Otto Opportunist, who scours SEC reports and various other public records day by day in hope of uncovering a massive fraud being perpetrated right under the government's nose. Supposing that Otto has a better nose for funny business than the federal government, and he is able to stumble upon

allegations made public does not bear on the case, as, pursuant to *Rockwell's* reasoning, “[i]t is difficult to understand why Congress would care whether a relator knows about the information underlying a publicly disclosed allegation.” *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1407 (2007).

¹¹⁴ That is, the company discloses information amounting to an “allegation or transaction” under the FCA—an amount at least equal to “ $X + Y$,” the elements of a transaction, in the terminology of *Springfield Terminal Ry. Co.*, 14 F.3d at 653-54 (italics added).

¹¹⁵ Note that the additional *Rockwell* bar against claims based partially on publicly disclosed allegations is not triggered where the action is not “based upon” public disclosure of allegations, because the court does not need to enter into original-source determination at all. *Rockwell* applies only to cases involving the original-source provision. *Rockwell*, 127 S. Ct. at 1401.

¹¹⁶ *Chen-Cheng Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992) (citing *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990)).

¹¹⁷ It is difficult to see how potential whistleblowers are in a better position to make determinations about the “quantity and quality of information in the public domain versus that possessed by the qui tam plaintiff” when making such determinations is too taxing for the judicial economy to bear. *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 553 (10th Cir. 1992).

a scheme early enough to file suit before the local prosecutor, his suit will be barred under the minority rule just as it would under the majority rule. In the case of Opportunist, so long as his information is drawn solely from the public record, any action that he files must necessarily be actually derived from the public disclosure of allegations or transactions—there is simply no other way for him to obtain the necessary information. If, on the other hand, Otto decides to snoop around and uncovers fraud based on his own observation of nonpublic activity (for example, if he discovers illegal pollution), then he is in the position of any other whistleblower: he has information not in the public record and therefore should be encouraged by the FCA to bring suit. As in the preceding example, Otto's legitimate case based on his own investigation would be precluded by the majority rule, but his illegitimate case based on public data would not be saved by the minority rule. Thus, any concern that the minority rule will be too lax seems unfounded—as does any expectation that the majority rule will bar more illegitimate claims.¹¹⁸

C. Putting It Together

The argument for the majority interpretation rests entirely on policy and imputed congressional intent, while the argument for the minority interpretation rests on policy, congressional intent, and linguistics. Taking these arguments into account, a future court should decide to adopt the minority interpretation as the more sound option. Indeed, most of the policy goals furthered by the majority rule are better achieved through the minority rule.¹¹⁹ Congressional intent, similarly, sits squarely in the corner of the minority rule, which does much more to encourage whistleblowing and is equally effective at deterring—or at least barring—parasitic suits. The minority rule may indeed lead to more qui tam plaintiffs recovering a percentage of the government's awards, which represents a significant cost to the government—but only when compared to a world in which the government has the information to proceed without the help of whistleblowers. In the real world there is an economy of information, and

¹¹⁸ *Contra, e.g., United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 940 (6th Cir. 1997) (arguing that the reduction in potential qui tam claimants because of the majority rule will necessarily reduce the number of illegitimate suits).

¹¹⁹ The one exception, perhaps, is judicial economy, which will probably suffer from the allowance of more suits, as predicted by *Precision*, 971 F.2d at 553. These increased suits are the price of seeking to encourage parties to come forward, however, and it appears to be a price that Congress was willing to pay.

increasing incentives to information holders—potential whistleblowers—serves to “make the pie higher.”¹²⁰ Thus, if there is such a thing as the Laffer Curve¹²¹ for fraud recovery, it is embodied in the majority rule: by attempting to secure more of the recovery revenue for the government, the rule destroys the incentive to create that revenue. The policy rationale for the minority rule, taken together with its faithfulness to the plain meaning of the statute, argues strongly for its adoption.

CONCLUSION

If the question of interpreting the PDJB reaches the Supreme Court, the outcome will be difficult to guess. Justice Alito has written in support of the majority rule in the past—he authored the opinion of the Third Circuit adopting the rule in that jurisdiction,¹²² and he expressed skepticism about the syntactic plain-language argument for the minority rule.¹²³ His vote, however, cannot be considered firmly on the side of the majority, as his opinion in *Mistick* “agree[d] with the Fourth Circuit that in ordinary usage the phrase ‘based upon’ is not generally used to mean ‘supported by.’”¹²⁴ Further complicating matters, the plain-meaning interpretation of the minority rule tends to increase the number of potential *qui tam* litigants, which cuts against the views of those Justices otherwise amenable to plain-language arguments.¹²⁵ The PDJB would not be the first question on which the

¹²⁰ Bob Herbert, Op-Ed., *Political Tongue Twisters*, N.Y. TIMES, Aug. 28, 2000, at A17 (quoting then-presidential candidate George W. Bush). The more common phrase, of course, is to “make the pie larger.”

¹²¹ See, e.g., James M. Buchanan & Dwight R. Lee, *Politics, Time, and the Laffer Curve*, 90 J. POL. ECON. 816, 817-18 (1982) (describing the Laffer Curve’s posited inverse relation between tax rates and revenue).

¹²² United States *ex rel.* Mistick PBT v. Hous. Auth., 186 F.3d 376, 388 (3d Cir. 1999).

¹²³ See *id.* (finding the PDJB’s language “syntactically ambiguous”).

¹²⁴ *Id.* at 386.

¹²⁵ For instance, Justice Scalia authored the opinion in *Rockwell*, which significantly limited the scope of the original-source exception to the jurisdictional bar.

otherwise textualist justices sided against linguistic evidence,¹²⁶ but it would certainly be one of the most clearly unambiguous cases.¹²⁷

¹²⁶ Indeed, Justice Scalia “think[s] it not contrary to sound principles of interpretation, in . . . extreme cases, to give the totality of context precedence over a single word.” Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 20-21 (Amy Gutmann ed., 1997).

¹²⁷ Justice Alito has, however, already clearly sided against linguistic evidence by contending that careless structural choice led to syntactic ambiguity in the PDJB. *See Mistick*, 186 F.3d at 388; *supra* text accompanying note 95.